

BCB Bank Bhd v Salim bin Abdullah

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HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(L)132
OF 2011

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UMI KALTHUM J
22 OCTOBER 2012

Land Law — Caveats — Removal of — Caveatable interest — Defendant alleged his late mother had purchased portion of land — Whether defendant had locus standi to act for his mother's estate — Misdescription of land — Whether defendant failed to prove his late mother had purchased portion of said land — Whether list of purchasers in Schedule One to sale and purchase agreement automatically conferred defendant interest in said land — Whether serious question to be tried established — Whether defendant's mother's failure to do anything to 'claim' her rights for a span of 48 years significant — Whether balance of convenience lay in favour of plaintiff — National Land Code ss 327(1) & 323

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The plaintiff applied for the removal of the private caveat entered by the defendant in respect of a piece of land held under Geran 98577 Lot 4207 in Batu Pahat, Johor ('the said land'). The plaintiff had purchased the said land from the administrators of the estate of Awad bin Husin ('the deceased'). Vide a power of attorney, the administrators had appointed the plaintiff as the true and lawful attorney of the administrators with the authority and power, amongst other things, to apply for the cancellation or removal of any private caveat registered in regard to the said land. The plaintiff was unable to register its title to the said land due to the existence of the private caveat that was entered by the defendant. The defendant stated that he had entered the caveat by reason that he was a beneficiary of his late mother who had purchased a small part of the said land. The defendant alleged that his late mother had purchased 8,000 sq ft of the said land from the deceased vide an agreement of sale and power of attorney dated 9 July 1956 entered into by his deceased mother and the deceased for the price of RM1,250. The transfer of the land purchased by his late mother could not be effected as it was in the process of subdivision. However, the physical possession of the land purchased was given to his mother. The defendant therefore contended that the sale and purchase agreement between the plaintiff and the administrators of the deceased was void because the latter had no capacity to sell the land purchased by his mother. The defendant also alleged fraud and cheating on his late mother by the deceased original land owner and that the plaintiff had full knowledge of the sale of that part of the said land. Because of the existence of the caveat, the plaintiff could not effect the transfer of the said land to itself. Hence, the

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- A plaintiff filed this action in the belief that the defendant had no locus standi to act for his mother's estate.

Held, allowing the plaintiff's application with costs:

- B (1) In the first paragraph of the preamble of the agreement of sale and power of attorney, the deceased property was described as 'Certificate of Title No 792 situated at Bukit Pasir, Mukim of Simpang Kanan V, Batu Pahat' of which the defendant's late mother was desirous of purchasing a portion thereof. However, the previous title of the said land was 'Certificate of Title No 702', and which was again later changed to 'Certificate of Title No 13146A Lot 4207', and now it was known as Geran 98577 Lot 4207. Based on these factual matrix, the defendant had failed to prove that his late mother had purchased a portion of the said land, for the description of the deceased's land differed in the agreement of sale and power of attorney from that of the said land. The list of first purchasers in Schedule One to the SPA did not automatically give the defendant an interest in the said land. The burden was still with the defendant to prove he had a caveatable interest (see para 12).
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- E (2) There was a misdescription of the land which his mother had bought, and even then being a beneficiary did not of itself give the defendant a caveatable interest within the meaning of the provisions of s 323 of the National Land Code. The misdescription of the land his mother bought could not be rectified by the defendant by merely making amendments to the small estate distribution Order. In view of the above, the defendant did not have the locus standi to enter any caveat let alone the said caveat on the said land as he had no caveatable interest in the same (see paras 13–14).
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- G (3) Since the defendant had failed to show that the deceased's land under the agreement of sale and power of attorney was the same as that of the said land, the court agreed with the plaintiff's submission that there was no serious question to be tried. Further, the fact that the defendant's mother had not done anything to 'claim' her rights for a span of 48 years was significant as it would appear to show the defendant's mother was not interested in 'claiming' her rights, if any (see paras 16–17).
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- I (4) The fact that the plaintiff had paid the full purchase price and the defendant had not promptly brought an action against the administrators or the plaintiff for any claim that he might have had in relation to the said land, the court was of the view that the balance of convenience lay in favour of the plaintiff. This was more so since the defendant had earlier lodged a private caveat in August 2003 and yet had done nothing to prosecute his case against the administrators and/or the

plaintiff until that earlier caveat had expired. The defendant only filed this suit against the administrators after eight years from the lodging of his first caveat (see para 18).

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[Bahasa Malaysia summary]

Plaintif memohon untuk pembatalan kaveat persendirian yang dimasukkan oleh defendan berkaitan sebidang tanah yang dipegang di bawah Geran 9877 Lot 4207 Batu Pahat, Johor ('tanah tersebut'). Plaintif telah membeli tanah tersebut daripada pentadbir-pentadbir harta pusaka Awad bin Husin ('si mati'). Melalui surat kuasa wakil, pentadbir-pentadbir tersebut telah melantik plaintif sebagai wakil benar dan sah pentadbir-pentadbir dengan kuasa dan hak, antara lain, untuk memohon pembatalan atau pengeluaran apa-apa kaveat persendirian yang didaftarkan berkaitan dengan tanah tersebut. Plaintif tidak boleh mendaftarkan hak milik terhadap tanah tersebut kerana kewujudan kaveat persendirian yang telah dimasukkan oleh defendan. Defendan menyatakan bahawa dia telah memasukkan kaveat tersebut dengan alasan bahawa dia adalah benefisiari arwah ibunya yang telah membeli sebahagian kecil tanah tersebut. Defendan mendakwa bahawa arwah ibunya telah membeli 8,000 kaki persegi tanah tersebut daripada si mati melalui suatu perjanjian jualan dan surat kuasa wakil bertarikh 9 Julai 1956 yang dimasuki di antara arwah ibunya dan si mati pada harga RM1,250. Pindah milik tanah yang dibeli oleh arwah ibunya tidak boleh dijejaskan kerana ia dalam proses pemecahan bahagian. Walau bagaimanapun, milikan fizikal tanah yang dibeli diberikan kepada ibunya. Defendan oleh itu menghujah bahawa perjanjian jual beli di antara plaintif dan pentadbir-pentadbir si mati adalah batal kerana mereka tidak mempunyai kapasiti untuk menjual tanah yang dibeli oleh ibunya. Defendan juga membuat dakwaan fraud dan penipuan terhadap arwah ibunya oleh pemilik asal tanah si mati dan bahawa plaintif mempunyai pengetahuan penuh mengenai jualan sebahagian tanah tersebut. Disebabkan oleh kewujudan kaveat tersebut, plaintif tidak boleh membuat pindah milik tanah kepada dirinya sendiri. Maka, plaintif memfailkan tindakan ini atas kepercayaan bahawa defendan tidak mempunyai locus standi untuk bertindak bagi pihak harta pusaka ibunya.

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Diputuskan, membenarkan permohonan plaintif dengan kos:

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- (1) Di dalam perenggan pertama pendahuluan perjanjian jualan dan surat kuasa wakil, harta si mati dinyatakan sebagai 'Certificate of Title No 792 situated at Bukit Pasir, Mukim of Simpang Kanan V, Batu Pahat' yang mana arwah ibu defendan ingin membeli bahagian tersebut. Walau bagaimanapun, hak milik terdahulu tanah tersebut adalah 'Certificate of Title No 702', dan yang kemudiannya ditukar sekali lagi kepada 'Certificate of Title No 13146A Lot 4207', dan kini dikenali sebagai Geran 98577 Lot 4207. Berdasarkan kepada matriks fakta, defendan telah gagal membuktikan bahawa arwah ibunya telah membeli

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- A sebahagian tanah tersebut, kerana gambaran tanah si mati berbeza di dalam perjanjian jualan dan surat kuasa wakil daripada tanah tersebut. Senarai pembeli-pembeli pertama di dalam Jadual Satu PJB tidak secara automatik memberikan defendan kepentingan di dalam tanah tersebut.
- B Beban masih dengan defendan untuk membuktikan bahawa dia mempunyai kepentingan yang boleh dikaveat (lihat perenggan 12).
- (2) Terdapat salah gambaran tanah tersebut yang dibeli oleh ibunya, dan walaupun demikian sebagai benefisiari ianya tidak dengan sendirinya memberikan defendan kepentingan yang boleh dikaveat dalam maksud peruntukan s 323 Kanun Tanah Negara. Salah gambaran tanah yang dibeli arwah ibunya tidak boleh diperbetulkan oleh defendan dengan membuat pindaan semata-mata kepada Perintah Pengagihan Harta Pusaka Kecil. Berdasarkan kepada di atas, defendan tidak mempunyai locus standi untuk memasukkan apa-apa kaveat dan kaveat tersebut atas tanah tersebut kerana dia tidak mempunyai kepentingan yang boleh dikaveat di dalamnya (lihat perenggan 13–14).
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- (3) Oleh sebab defendan telah gagal menunjukkan bahawa tanah si mati di bawah perjanjian jualan dan surat kuasa wakil adalah sama seperti tanah tersebut, mahkamah bersetuju dengan hujahan plaintif bahawa tidak ada persoalan serius yang boleh dibicarakan. Selanjutnya, fakta bahawa ibu defendan tidak berbuat apa-apa untuk ‘menuntut’ haknya bagi tempoh 48 tahun adalah penting kerana ia menunjukkan bahawa ibu defendan tidak berminat dalam ‘menuntut’ haknya, jika ada (lihat perenggan 16–17).
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- (4) Selain dari yang di atas, fakta bahawa plaintif telah membayar harga penuh belian dan defendan tidak segera mengambil tindakan terhadap pentadbir-pentadbir atau plaintif bagi apa-apa tuntutan yang dia mungkin ada berkaitan dengan tanah tersebut, mahkamah berpendapat bahawa imbalan kesenangan berpihak kepada plaintif. Ini adalah lebih-lebih lagi kerana defendan telah terlebih dahulu memasukkan kaveat persendirian dalam bulan Ogos 2003 dan masih belum berbuat apa-apa untuk mendakwa kesnya terhadap pentadbir-pentadbir dan/atau plaintif sehingga kaveat terdahulu luput. Defendan hanya memfailkan guaman ini terhadap pentadbir-pentadbir selepas lapan tahun daripada pemasukan kaveat pertamanya (lihat perenggan 18).]
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Notes

- I For cases on removal of caveats, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2579–2585.

Cases referred to

Jasalam (M) Sdn Bhd v Wong Koon Yee [2000] 3 MLJ 115, CA (folld)

- Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, CA (refd) A
- Mok Yong Kong & Anor v Mok Yong Chuan* [2002] 2 MLJ 718, CA (folld)
- Plimmer Bros v St Maur* (1906) 26 NZLR 294 (refd)
- Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 (refd) B

Legislation referred to

National Land Code ss 323, 327(1), Forms 14A, 19B

- Anasya (K Sila Dass & Partners) for the plaintiff.*
- Shahareen Begum bt Abdul Subhan (Imran, Shahareen & Co) for the defendant.* C

Umi Kalthum J:

THE APPLICATION

[1] The plaintiff applied in encl 2 for the removal of the private caveat entered by the defendant Presentation No 11307/2010 dated 1 April 2010 ('the said caveat') in respect of land held under Geran 98577 Lot 4207 Mukim Simpang Kanan, Daerah Batu Pahat, Johor ('the said land').

FACTS

[2] The plaintiff had entered into a sale and purchase agreement dated 23 September 2003 with Petom bt Awath @ Awad, Salim bin Awad and Jamal Abdul Nasir bin Awad as the administrators De Bonis Non ('the administrators') of the estate of Awad bin Husin ('the deceased') ('the SPA') for the purchase of the said land. The purchase price was the sum of RM5.5m (exh 'TSL1', encl 3).

[3] Vide a power of attorney dated 23 September 2003 (exh 'TSL2' encl 3), the administrators had appointed the plaintiff as the true and lawful attorney of the administrators with the authority and power, amongst other things, to apply for the cancellation or removal of any private caveat registered in regard to the said land.

[4] The plaintiff had paid the balance of the purchase price of RM2,133,000 and had filed the Form 14A, Form PDS 5 as well as a copy of the court's order dated 5 July 2004 giving the administrators the leave to sell the said land to the plaintiff (exh 'TSL3'). The plaintiff contended that it is the beneficial owner of the 5185/5712 undivided share of the said land as it had paid the full purchase price.

[5] The plaintiff was unable to register its title to the said land due to the

A existence of two private caveats. The plaintiff filed two originating summons action againsts the respective caveators, including the defendant in this case.

B [6] The caveat entered by the defendant, however, had earlier on expired on 31 July 2009, which then led to the plaintiff withdrawing the action in the Muar High Court Originating Summons No 24(L)476 of 2010 with liberty to file afresh.

C [7] Upon making an official search in the land office on 27 October 2010 the plaintiff found that the defendant had entered another private caveat, that is, the said caveat in respect of the said land. In his statutory declaration dated 25 March 2010, which was attached to his Form 19B, the defendant stated that he had entered the said caveat by reason that he is a beneficiary of his late mother who had purchased a small part of the said land (exh 'TSL7', encl 3).

D [8] Because of the existence of the said caveat, the plaintiff could not effect the transfer of the said land to itself. The plaintiff filed this action in the belief that the defendant has no locus standi to act for his mother's estate.

E [9] On his part, the defendant alleged that his late mother, Fatimah bt Said Makarim, had, vide an agreement of sale and power of attorney dated 9 July 1956, purchased from Awad bin Husin (the deceased) 8,000 sq ft of the said land for the price of RM1,250 (exh 'SA1', encl 9). The purchase price was fully paid by his late mother. The transfer of the land purchased by his late mother could not be effected as it was in the process of subdivision. Physical possession of the land purchased however was given to his mother. The defendant's mother died on 6 October 2004. The defendant and his brother named Omar bin Abdvullah were appointed as co-administrators of his mother's estate (exh 'SA3' — encl 9). The defendant contended that part of the said land had formed part of his mother's estate. That the original owner/the deceased of the said land had no legal nor beneficial rights over that part of the said land and held that part of the said land bought by his mother in trust for his mother. This can be seen in Schedule One to the SPA at item 42 where his late mother's name appeared as 'First Purchaser' (exh 'TSL1', encl 3). The defendant therefore contended that the SPA is void seeing that the administrators of the deceased had no capacity to sell the land purchased by his mother. The defendant alleged fraud and cheating on his late mother by the deceased's original land owner and the plaintiff who had full knowledge of the sale of that part of the said land.

THE DECISION

I [10] I allow the plaintiff's application with costs at RM10,000. I do so for

the following reasons.

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Aggrieved person

[11] I find that the plaintiff is an aggrieved person within the meaning of s 327(1) of the National Land Code ('NLC'). This is because:

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- (a) the plaintiff had paid the full purchase price of RM5.5m;
- (b) the vendors of the said land, being the administrators, had done everything they could to transfer/divest the interest in the said land to the plaintiff, including forwarding the original document of title, to the plaintiff;
- (c) the plaintiff had executed Form 14A; and
- (d) the plaintiff could not effect the transfer of the said land to itself due to the existence of the said caveat against the said land.

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Caveatable interest

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[12] On the authority of the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, the defendant has to prove that he has a caveatable interest over the said land. The defendant's claim to having a caveatable interest was based on a purported agreement of sale and power of attorney dated 9 July 1956 entered into by his deceased mother and the deceased for the purchase price of RM1,250. Upon a close perusal of the agreement of sale and power of attorney, in the first paragraph of the Preamble, the deceased property was described as 'Certificate of Title No 792 situated at Bukit Pasir, Mukim of Simpang Kanan V, Batu Pahat' of which the defendant's late mother was desirous of purchasing a portion thereof (exh 'SA1', encl 9). However, the previous title of the said land was 'Certificate of Title No 702', and which was again later changed to 'Certificate of Title No 13146A Lot 4207', and now it is known as Geran 98577 Lot 4207 (exhs 'SA5', 'SA6' encl 13). Based on these factual matrix, I agree with the submission of learned counsel for the plaintiff that the defendant has failed to prove that his late mother had purchased a portion of the said land, for the description of the deceased's land differed in the agreement of sale and power of attorney from that of the said land. The list of first purchasers in Schedule One of the SPA does not automatically give the defendant an interest in the said land. The burden is still with the defendant to prove he has a caveatable interest.

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[13] Further, the defendant had, in his statutory declaration which was attached to his Form 19B, stated that his mother had purchased a small portion of the said land and he being one of his mother's beneficiaries had entered the

- A said caveat. It is trite law that the caveator is bound by his statements in Form 19B. See Court of Appeal case *Mok Yong Kong & Anor v Mok Yong Chuan* [2002] 2 MLJ 718. Obviously there is a misdescription of the land which his mother had bought, and even then being a beneficiary does not of itself give the defendant a caveatable interest within the meaning of the provisions of s 323 of the NLC. The misdescription of the land his mother bought cannot be rectified by the defendant by merely making amendments to the small estate distribution order dated 1 December 2008 (exh 'SA7', encl 13).
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- C [14] In view of the above, I agree with the plaintiff's counsel's submission that the defendant does not have the locus standi to enter any caveat let alone the said caveat on the said land as he has no caveatable interest in the same.

- D [15] I also agree with the plaintiff's counsel's submission that based on the authority of the Court of Appeal case of *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115 the defendant's said caveat cannot be allowed to stand as the defendant had entered the said caveat on the whole piece of land whilst the defendant was purportedly claiming only on a small portion of it.

- E [16] Since I have found the defendant not to have a caveatable interest, I need not go further to consider the other two issues, that is, whether there is a serious question to be tried and the balance of convenience. But for the sake of completeness I will deal with them.

- F *Serious question to be tried*

- G [17] Since the defendant had failed to show that the deceased's land under the agreement of sale and power of attorney is the same as that of the said land, I agree with the plaintiff's counsel's submission that there is no serious question to be tried. The fact that the defendant's mother had entered into the alleged agreement on 9 July 1956 and had passed away on 6 October 2004 and had not done anything to 'claim' her rights for a span of 48 years is significant to me as it would appear to show the defendant's mother was not interested in 'claiming' her rights, if any.

- H *Balance of convenience*

- I [18] Since the plaintiff had paid the full purchase price of RM5.5m and the defendant had not promptly brought an action against the administrators or the plaintiff for any claim that he may have in relation to the said land, I hold that the balance of convenience lies in favour of the plaintiff. This is more so since the defendant had earlier lodged a private caveat Presentation No 26906/2003 on 1 August 2003 and yet had done nothing to prosecute his case against the administrators and or the plaintiff until that earlier caveat had

expired. The defendant only filed a Civil Suit No 22–75 of 2011 against the administrators after eight years from the lodging of his first caveat. Of relevance at this juncture I wish to quote at length Ahmad Fairuz JCA (as he then was and delivering the judgment of the court) on the issue of delay in the Court of Appeal case of *Jasalam (M) Sdn Bhd v Wong Koon Yee* at p 122 paras C–F where he had referred to *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 and *Plimmer Bros v St Maur* (1906) 26 NZLR 294 and stated that:

... The Supreme court held that *Teo Ai Choo's* case does not involve a delay of lodging a caveat but involves delay in the commencement of an action by the defendant in respect of their dispute. As such the Supreme Court was of the view that *Teo Ai Choo's* case did not avail the respondent (in the *Kumpulan Sua Betong Sdn Bhd's* case). *Plimmer Bros'* case, like *Teo Ai Choo's* case, involves an application by summons to remove a caveat against the land in question in the case. The summons was taken out on 30 July, more than a month after the caveat was lodged. Up to the time of hearing the summons, the defendant had commenced no action against the plaintiff for the performance of the relevant contract. Stout CJ held that it was the defendant's duty to commence an action promptly if he considered himself entitled to specific performance. The learned Chief Justice referred to the case of *Glasbrook v Richardson* (1874) 23 WR 51 which held that a delay of two months and a half was too long. In *Plimmer Bros'* case, nothing was done for nearly 16 months and then a caveat was lodged. More than a month had elapsed since then and still no action has been commenced. On this, the learned Stout CJ then said: 'In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious.' The learned Chief Justice was also of the opinion that it is inequitable to prevent a man dealing with his property after such a long delay and the court will not lend its assistance to such a proceeding. The Chief Justice consequently removed the caveat.

Plaintiff's application allowed with costs.

Reported by Ashgar Ali Ali Mohamed